Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

REGENIA F. QUINLEY,
Petitioner,

vs.

STATE FARM INSURANCE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the granting of Summary Judgment at the trial level and the affirmance of same by the Eleventh Circuit Court of Appeals given the presumptions that apply in favor of the non-movant, the Petitioner, Regenia F. Quinley, constitute in effect a ruling that Title I of the Americans with Disabilities Act of 1990 prohibiting discrimination in the hiring as to qualified individuals and requiring employers, as the Respondent, State Farm Insurance Corporation, to make reasonable efforts to accommodate the individuals mental or physical limitations as long as those accommodations do not present an undue hardship to the employer; does not prohibit or restrict the removal of reasonable accommodations afforded to a qualified individual so as to cause that otherwise qualified individual working with reasonable accommodations to lose their employment.

2. Given the provisions of Title I of the Americans with Disabilities Act of 1990 prohibiting discriminatory hiring and personnel practices as to private business such as the Respondent, State Farm Insurance Corporation, and the presumptions that apply on behalf of the non-movant, the Petitioner, Regenia F. Quinley, as

the employee on the employer's, State Farm, Motion for Summary Judgment does the granting of Summary Judgment on the trial level before the Southern District of Alabama and the affirmance of same by the Eleventh Circuit Court of Appeals constitute effectively a ruling or finding that the provisions of Title I of the Americans with Disabilities Act of 1990 have no force and affect in prohibiting a situation wherein accommodations existing and affording a qualified individual the ability to move forward with employment are removed so as to place the otherwise qualified individual in a situation of non-accommodation of disability resulting in loss of employment.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eleventh Circuit are those in the caption (Eleventh Circuit Court of Appeals C.A. No. 96-6798) namely the Petitioner, Regenia F. Quinley, and the Respondent, State Farm Insurance Corporation.

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Petitioner, Regenia F. Quinley, herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on April 22, 1997.

OPINIONS BELOW

The decision of the District Court is unreported. The decision of the Court of Appeals is reported at 113 Federal Reporter 3rd 1251 (Eleventh Circuit 1997)

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered on April 22, 1997. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was invoked under 28 U.S.C. § 1345.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq:

> An employer shall be prohibited from engaging in discriminatory hiring and personnel practices against qualified individuals and shall make reasonable efforts to accommodate individuals mental or physical limitations as long as the accommodations do nor

present an undue hardship to the employer.

42 U.S.C. § 12112(a):

> A.D.A. prohibits employers from discriminating against qualified individuals with disabilities who with or without reasonable accommodations can perform the essential functions of a job.

42 U.S.C. § 12102(2):

> Under A.D.A. an individual is classified as disabled if he or she: Has a physical or mental impairment and the impairment substantially limits one or more of the individuals major activities in life; has a record or history of such an impairment; or is perceived as having such an impairment.

29 C.F.R. 1630.2(h)(1):

> Physical or mental impairment as adopted by the EEOC includes: Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more systems of the body such as the nervous and musculoskeletal system, respiratory organs, cardiovascular system and the glands.

29 C.F.R. 1630.2(I)(Appendix):

> Major life activities as per EEOC adopting the Rehabilitation Act's definition include sitting, standing, lifting and reaching.

29 C.F.R. 1630.2(j)(3)(I):

> A person who is substantially limited would be one

who is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs when compared with an average person having comparable training skills and abilities.

STATEMENT OF THE CASE

Title I of the Americans with Disabilities Act of 1990 prohibiting discriminatory hiring and personnel practices against qualified individuals requires employers to make reasonable efforts to accommodate individuals mental or physical limitations as long as those accommodations do not present an undue hardship to the employers. This law in essence requires private businesses as the Respondent to give persons as the Petitioner, Regenia F. Quinley, with disabilities the same consideration for employment and career advancement that other individuals are afforded and in the process the employer may have to modify its work procedure or the physical features of the workplace to meet the needs of a disabled employee. Title I effective July 26, 1997 applies to the respondent, State Farm Insurance Corporation.

Title I is enforced by the Equal Employment Opportunity Commission which issued regulations July 26, 1991 29 C.F.R. 1630

adopting the definition of the Rehabilitation Act of 1973 as to physical or mental impairments which include psychological disorders or conditions affecting one or more systems of the body to include the musculoskeletal system. Under the Americans with Disabilities Act an individual is classified as disabled if he or she has a physical or mental impairment and the impairement substantially limits one or more of the individual's major activities in life. 42 U.S.C. §12102(2).

Petitioner, Regenia F. Quinley, filed the complaint in the Federal District Court for the Southern District of Alabama on Apirl 3, 1995 alleging violations of Title I of the Americans with Disabilities Act against the Respondent contending that as Mrs. Quinley had performed her job with the Respondent as a secretary not requiring bending, lifting and stooping due to her history of musculoskeletal problems requiring various surgeries prohibiting or limiting bending, lifting or stooping that the shift from the secretaial job not requiring bending, lifting and stooping to a position in mail and file with the Respondent requiring bending, lifting and stooping was, in fact, a failure to accommodate Mrs. Quinley's disability resulting in her being unable to perform the position to which she had

been transferred and her ultimate seperation from the Respondent, State Farm Insurance Corporation.

Respondent filed a Summary Judgment before the Federal District Court for the Federal District Court for the Southern District of Alabama and Summary Judgnment was granted on June 26, 1996 and Notice of Appeal was filed Augusut 9, 1996. The Eleventh Circuit Court of Appeals affirmed on April 22, 1997 the Federal District Court granting of Summary Judgment as per Eleventh Circuit Court Rule 36-1 mandate being issued May 22, 1997.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO THE EXTENT TO WHICH THE AMERICANS WITH DISABILITIES ACT OF 1990 SPECIFICALLY TITLE I THEREOF PROHIBITS DISCRIMINATORY HIRING AND PERSONNEL PRACTICES AGAINST QUALIFIED INDIVIDUALS REQUIRING EMPLOYERS SUCH AS THE RESPONDENT, STATE FARM, TO MAKE REASONABLE EFFORTS TO ACCOMMODATE INDIVIDUALS MENTAL OR PHYSICAL LIMITATIONS AS LONG AS THOSE ACCOMMODATIONS DO NOT PRESENT AN UNDUE HARDSHIP TO THE EMPLOYER.

Regenia F. Quinley filed the complaint April 3, 1995 alleging violations of the Americans with Disabilities Act against State Farm

Insurance Company. State Farm filed a motion for extension of time for responding to the complaint on May 17, 1995 which motion was granted on May 19, 1995.

Regenia Quinley became employed with State Farm Insurance in November 1985 as a C3 (Secretary) which job did not require lifting, bending or stooping. After being hired Mrs. Quinley was involved in two automobile accidents in 1986 and 1992 and sustained back injuries resulting from those accidents restricting her ability to bend, lift or stoop. During this time frame, her employer, State Farm, accommodated her back injury by allowing her to continue to function as a secretary not requiring bending, lifting to stooping. Mrs. Quinley was able to handle the secretarial position with those accommodations. After the second automobile accident, September 11, 1992, State Farm's regional medical director, James Abroms, communicated with Mrs. Quinley's physician, Dr. Bridges, on September 11, 1992 confirming that State Farm knew that Mrs. Quinley had missed some time from work because of illness and asking for Mrs. Quinley's diagnosis and <u>limitations</u> which letter suggested to Dr. Bridges (Emphasis Supplied):

> "We do not under any circumstances want to put Mrs. Quinley under any excess strain which could be injurious to her health. I appreciate your attention to these points." (R1-12, Folder 1, Exhibit 2)

Dr. Bridges responded by submitting medical notes dated September 15, 1992 referencing low back pain for Mrs. Quinley which was worse which notes submitted to Dr. Abroms as the medical director for State Farm suggested in part as follows:

> "I believe the answer to her problem is to change her activities. I am making plans for her to have a one time half day visit to a back instructional program. Hopefully she can begin an exercise program for her back. She needs to change her activities at work, such as constant sitting, and a program of walking twice a day. I have recommended that she work half days only for another week. If she has increasing difficulty, I would like to see her again."

In addition during this time frame, Dr. Abroms received MRI results on the lumbar spine from Dr. Bridges showing disc bulges at L3-4, L4-5.

Notwithstanding the fact that as of the Summer 1993 Dr.

Abroms as Regional Medical Director of State Farm had been advised that Mrs. Quinley was having back problems and had bulging discs at two levels as a result of two automobile accidents, in the Summer of 1993, specifically on June 1, 1993, Mrs. Quinley was shifted to a mail and file clerk position which was a lateral move requiring substantial lifting, bending and stooping.

After that move, Mrs. Quinley was involved in another automobile accident on August 20, 1993 giving rise to the submission by Dr. Ray of a medical report dated November 22, 1993 indicating that Mrs. Quinley had strained her back following the accident on August 20, 1993 and had not been able to return to work. Further, during that time frame, a Myelogram/Lumbar exam was submitted to State Farm dated September 29, 1993 indicating that Mrs. Quinley had lumbar strain, low back pain and bulging discs at L3-5, L4-5 and L5S1 and Dr. Ray submitted a report on September 20, 1993 that Mrs. Quinley was under his care following a motor vehicle accident and was not able to work.

During this time frame, Mrs. Quinley continued to try to work in the mail and file clerk position requiring substantial lifting, bending

and stooping unlike the C3 Secretarial position that she had been laterally moved from.

On January 26, 1994, Dr. Ray sent a letter to State Farm providing:

> "To whom it may concern, I feel that although Mrs. Quinley is largely improved from the aggravating factors of the accident of August 1993, and her presenting complaints in September she certainly has a tendency toward easy aggravation, easier aggravation than before. She does have at least three bulging lumbar discs which may eventually require additional investigation and treatment. I recommend that she not be expected to do any heavy lifting. She will have to be extremely careful about excessive bending and positioning. She needs to get up and move around fairly frequently in order to avoid stiffness and strain in the low back."

To that correspondence Dr. Abroms, on behalf of State Farm, sent a letter of February 22, 1994 confirming that they (State Farm) understood that Mrs. Quinley had significant restrictions placed on her because of her back pain and herniated, bulging discs and that:

> "We at State Farm do not want to put Mrs. Quinley at any increased risk to

> hurting herself. To that end we would like to update her condition and her restrictions. In addition, any information about her prognosis would be greatly appreciated.
>
> Our main concerning is not to put Mrs. Quinley in a position where she could hurt herself and, with your help, we will try to do just that."

To Dr. Abroms correspondence, Dr. Ray responded February 25, 1994 confirming bulging discs for Mrs. Quinley at three levels L3-5, L4-5 and L5S1 as noted on the CT Scan done September 29, 1993 and the aggravation of those conditions by the recent motor vehicle accident which was the third motor vehicle accident she had been involved in confirming as follows:

> "All of this has been aggravated by a motor vehicle accident that she was involved in. She is doing must better but still has episodes of distress from the waist up and as this is aggravated by bending and lifting, she does okay with sitting because she gets up and down frequently but lifting really throws her into a spasm.
>
> I feel that she has largely improved from the aggravating factors of the accident of August 1993 but she does have a tendency towards easy

> aggravation. She does have at least three bulging lumbar discs which may eventually require additional investigation and treatment. I recommend that she not be expected to do any heavy lifting and she will have to be extremely careful about excessive bending and positioning. She needs to get up and move about fairly frequently to avoid stiffness and strain in the low back."

Following Dr. Ray's letter of February 25, 1994 to Dr. Abroms, Mrs. Quinley was kept in the mail and file position requiring bending, lifting and stooping. Subsequently, Mrs. Quinley fractured her right hand and Dr. Ray submitted a report wherein, again, Mrs. Quinley was restricted from doing excessive bending or heavy lifting for two months until the fracture healed. Those notes indicate in part as follows:

> "Regenia Quinley has been working with State Farm for 8 years. she says they keep trying to make her lift things. It hurts her back..."

Subsequent to this correspondence by and between Dr. Abroms, Mrs. Quinley was kept in the mail and file clerk position requiring excessive bending, lifting and stooping and Mrs. Quinley

took sick leave in August 1994 as during that time frame work in the mail and file position had aggravated her back. During sick leave, she fractured her foot and Dr. Ray submitted additional reports to State Farm that she could only return to light duty work and should be restricted from prolonged walking standing, squatting, climbing, which was confirmed by letter from Dr. Ray to Dr. Abroms October 12, 1994.

During this time frame, Mrs. Quinley was not allowed to return to her C3 position not requiring bending, lifting and stooping although she had clearance from Dr. Ray of October 6, 1994 to return to light duty work on October 10, 1994.

Mrs. Quinley, upon presenting that clearance and requesting the C3 non-bending,. lifting or stooping position, was refused that position and told to return home on or about October 10, 1994 during which time she filed the EEOC complaint on October 14, 1994.

After filing the EEOC Complaint October 10, 1994, Mrs. Quinley was offered a position at State Farm in January 1995 which again was the mail and file clerk position requiring bending, lifting

and stooping which she could not perform.

On the Federal District Court's granting of Summary Judgnment on behalf of the Respondent, the Eleventh Circuit's review of that ruling was plenary and the Eleventh Circuit should not affirm the Federal District Court's granting of Summary Judgment unless, after construing the evidence in a light most favorable to the non-moving party, the Petitioner, the Eleventh Cirucit concluded that no genuine issue exists as to material fact and that the moving party was entitled to judgment as a matter of law. C.B. By and Through Breeding vs. Driscoll, 82 F. 3d 383, 386 (11th Cir 1996).

Pursuant to Rule 56c of the F.R.C.P. State Farm would be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Rice vs. Branigar Organization, Inc. 922 F. 2d 788, 790 (11th Cir. 1991) (citing Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

State Farm's burden was to show there was no genuine issue

of material fact to be decided at trial. Clark vs. Coats and Clark, Inc., 929 F. 2d 604, 608 (11th Cir. 1991). Upon such a showing, the burden would shift to the non-moving party, Mrs. Quinley, to establish the existence of material issues of fact that would preclude summary judgment. If State Farm could establish that Mrs. Quinley would be unable as a matter of law to establish an element of her case or her cause of action, State Farm would be deemed to meet its burden under a motion for summary judgment. Celotex Corporation vs. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L.Ed. 2d 265, 575 (1986); Real Estate Financing vs. Resolution Trust Corporation, 950 Fed. 2d 1540 (11th Cir. 1992).

This Court's standard of review for a judgment as a matter of law is *de novo*. Colvin vs. Housing Authority of Sarasota Florida, 71 F. 3d 864, 866 (11th Cir. 1996). Further, on granting of summary judgment this Court reviews:

> "On summary judgment the inferences are drawn from the underlying facts contained in such materials (affidavits, depositions, exhibits) and must be viewed in a light most favorable to the party opposing the motion and we look at the record on summary judgment in

> a light most favorable to the party opposing the motion." (See U.S. vs. Diebold, Inc., 1962 82 S. Ct. 993, 369 U.S. 654 8th L. Ed. 2d 176; Poller vs. Columbia Broadcasting Systems, Inc., 1962 82 S. Ct. 486, 491 368 U.S. 464 7th L. Ed. 2d 458).

Regenia F. Quinley, was employed by State Farm in 1985 and performed her position as a secretary not requiring bending, lifting and stooping up until June 1993. In the interim time, Mrs. Quinley had two automobile accidents which are documented as causing her to have bulging discs at two or three levels and restricted her activities in regard to bending, lifting and stooping. These medical records and condition of Mrs. Quinley were documented and had been filed with State Farm.

Notwithstanding that information, Mrs. Quinley was shifted, in the Summer of 1993, specifically June 1993, to a lateral position requiring bending, lifting and stooping. After that shift to a position requiring bending, lifting and stooping which she could not perform due to her pre-existing lower back problems resulting from pre-existing automobile accidents she was involved in a third automobile

accident in August 1993 aggravating her existing back condition.

Mrs. Quinley's major life activities namely bending, lifting or stooping were substantially limited based on the three automobile accidents and the aggravation of the back condition that she had. Major activities are defined at 29 C.F.R. 6030.2(I) as including walking, working, sitting, standing and lifting. Accordingly, as per 42 U.S.C. § 12112, Mrs. Quinley had a physical impairment limiting a major activity. Mrs. Quinley was shown to have been able to perform her job as secretary from 1986 to 1993 not requiring bending, lifting or stooping which was a reasonable accommodation afforded to her so as to allow her to perform the essential functions of her job as a C3 secretary. (See 42 U.S.C., § 12111(a).

On verification to Dr. Abroms by Mrs. Quinley's treating physicians that due to the three automobile accidents, her back was in such a shape that she could not bend, lift or stoop, Mrs. Quinley was shifted laterally out of that position which she could perform into a mail and file clerk position June 1993. The shift of Mrs. Quinley to a job requiring bending, lifting or stooping, given her physical restrictions known to State Farm, did not constitute a reasonable

accommodation of Mrs. Quinley's disability as per 29 C.F.R. 1630.2(o)(2).

Accordingly, State Farm's shifting of Mrs. Quinley out of a position that she could hold, notwithstanding her back injures, to a position she could not perform all with knowledge constitute on behalf of State Farm, discrimination against Mrs. Quinley as a qualified employee as per 42 U.S. C. § 12112(a) and the conduct of State Farm with notice of Mrs. Quinley's disability all of which was documented with State Farm's medical director evidenced an intent and pattern of failing to provide reasonable accommodation for Mrs. Quinley. In fact, the conduct of State Farm shows the total reverse of reasonable accommodations as State Farm, rather than analyzing Mrs. Quinley's job, her back problems and providing essential and potential accommodations that would enable Mrs. Quinley to continue to perform her job tasks as per 29 C.F.R. 1630.9 (appendix) did just the reverse.

In assessing State Farms liability, it must be determined whether or not Mrs. Quinley was a qualified individual with a disability to whom State Farm owed a duty to provide reasonable

accommodations to provide Mrs. Quinley's known disabilities and whether there were issues of material fact in this case as to Mrs. Quinley's disability and knowledge thereof by State Farm and failure to accommodate Mrs. Quinley's disability with reasonable accommodations which would preclude the granting of summary judgment in favor of State Farm Insurance Corporation the employer.

Mrs. Quinley started work in 1985 and performed her work as a C3 secretary without bending, lifting and stooping being required. After 1985, over a period of seven years she was involved in three automobile accidents and in September 1992, Dr. Abroms, on behalf of State Farm became so concerned about Mrs. Quinley's medical condition that he inquired of her physician as to her diagnosis, prognosis and limitations so as not to "put Mrs. Quinley under an excessive strain which could be injurious to her health". That specific inquiry of Dr. Bridges brought about a response that the solution for Mrs. Quinley would be to have her attend a back instructional program, begin an exercise program and change her activities at work such as constant sitting and a program of walking twice a day.

Notwithstanding that correspondence and the fact that Mrs. Quinley had been able to perform her job as a C3 secretary not requiring bending, lifting or stooping, for seven years, she was transferred laterally June 1, 1993 to a position requiring bending, lifting and stooping. After that transfer, Dr. Ray continued to submit reports indicating that Mrs. Quinley was under his care for back strain and on January 26, 1994 submitted a report confirming that although she was recovering from the August 1993 accident (third accident) she had three bulging lumbar discs and should not be required to do any heavy lifting and should be careful about excessive bending and positioning. That report of January 26, 1994 was consistent with the MRI reports of September 1992 and September 1993 submitted to State Farm confirming Mrs. Quinley's disc herniations at three levels. After all of that, Dr. Abroms responded February 22, 1994 confirming that they (State Farm) understood that Mrs. Quinley had significant restrictions placed on her because of her back pain and herniated bulging discs and did not want to place Mrs. Quinley at any increased risk of hurting herself and that State Farm's "main concern was not to put Mrs. Quinley in a position where she

could hurt herself and with your help we will try to do just that". Dr. Ray responded promptly to that request of Dr. Abroms on February 25, 1994 confirming again bulging discs at three levels for Mrs. Quinley and restricting her from heavy lifting and requiring that she be careful about excessive pending and positioning and sent office notes May 9, 1994 confirming that Mrs. Quinley continued to complain of back pain and could not lift things at State Farm as it hurt her back.

Notwithstanding, that correspondence from Mrs. Quinley and from her physician to Dr. Abroms, State Farm's medical director, she was kept in the mail and file clerk position to which she had been transferred June 1, 1993 requiring bending, lifting and stooping.

In August 1994, Mrs. Quinley took medical leave as her back condition had worsened and she had injured her ankle.

Mrs. Quinley supplied a return to work certificate from Dr. Ray returning her to light duty work on October 10, 1994. Upon presenting that, Mrs. Quinley was told to "go home". Four days later Mrs. Quinley filed the EEOC complaint and four months later she was offered the job back at State Farm as a mail and file clerk

requiring bending, lifting and stooping, which she could not perform.

Thusly, there are at least substantial material issues of fact in this case as to whether State Farm with knowledge of Mrs. Quinley's disability related to her back injures and her inability to bend, lift or stoop, engaged in a pattern of conduct evidencing an intent to not reasonably accommodate Mrs. Quinley's disability and to find a way to terminate her. Mrs. Quinley's medical condition had been repeatedly documented with State Farm through its medical director and notwithstanding that documentation she was shifted to a position which called for her doing those things, that is, bending, lifting and stooping which had not previously been required and which she was not able to engage in due to her automobile accidents. Accordingly, Mrs. Quinley was a qualified individual with State Farm with seven years of employment who could have and was willing to continue that employment at the time of the transfer to a position she could not perform due to her disability.

At the time of the transfer of Mrs. Quinley in June 1993, at a time that Mrs. Quinley had exhibited the fact that she was a qualified individual with a disability who could perform due to her skills and

experience the position of C3 not requiring bending, lifting and stooping, State Farm was knowledgeable about the limitations on Mrs. Quinley's physical abilities and notwithstanding that knowledge caused her to be transferred June 1993.

After the transfer, State Farm continued to be informed, at the specific request of the its medial director, of Mrs. Quinley's limitations on bending, lifting and stooping and notwithstanding that information, failed to make any reasonable accommodations for Mrs. Quinley. In fact, in this case, when Mrs. Quinley attempted to return to work on October 10, 1994 with a certificate from Dr. Ray that she could return to light duty work she was told to "go home" and within a few days thereafter received a letter from Mr. Marquardt indicating that unless they received all medical information by October 28, 1994 she would be terminated. Of course, at that time, not only had State Farm not reasonably accommodated Mrs. Quinley's disability, but State Farm had all the medical records, they knew the scope and extent of her back problems and they knew that she could perform work as a secretary not requiring bending, lifting and stooping and continued to insist on a position requiring those things.

When construing all the evidence in a light most favorable to Mrs. Quinley at the minimum there are certainly genuine issues as to material facts in this case concerning the scope and extent of Mrs. Quinley's disability and knowledge thereof by State Farm and the failure by State Farm to act on that knowledge and to reasonably accommodate Mrs. Quinley as a qualified employee and the pattern and practice of State Farm in refusing to accommodate and refusing to allow Mrs. Quinley to return to the work that she could work at in October 1994 and documenting subsequent to her threatened termination a work capacity evaluation labeled as "independent".

It is respectfully submitted that the facts in this case when construed on summary judgment in favor of Mrs. Quinley indicate a pattern of practice by State Farm to ignore Mrs. Quinley's back problems, place her in a position she could not work at and continue to pressure her to supply medical information that she had already supplied, refuse to honor her doctor's light duty return to work order of October 10, 1994 and after Mrs. Quinley files an EEOC complaint October 14, 1994 to attempt to justify its position by a work hardening evaluation that in and of itself contains gross inaccuracies

and inconsistencies showing material issues of fact.

As in Tuck vs. HCA Health Services of Tennessee, Inc. d/b/a HCA Donaldson Hospital (D.C.M. Tennessee 6-4-92), 3 AD Cases 517 an ex-Registered Nurse having a back injury who could not perform all the essential duties of the job working in the progressive care unit because she could not lift heavy objects was otherwise qualified for Registered Nurse positions elsewhere in the hospital and could have performed essential functions with reasonable accommodations although the hospital did not offer her another positions when it terminated her. This conduct by the employer constituted a violation of the ADA.

In this case, Mrs. Quinley having a back injury, could and did perform her job as secretary not requiring bending, lifting and stooping. Notwithstanding that performance, she was shifted laterally to a position requiring bending, lifting and stooping and notwithstanding the express desire of State Farm to accommodate her as per correspondence from Dr. Abroms and Mr. Marquardt, State Farm continued to keep her in a position requiring bending, lifting and stooping notwithstanding bulging discs at three levels.

Again, it is respectfully submitted that construing the evidence in favor of Mrs. Quinley, these facts create at least substantial issues of fact and mandate the reversal of this case on the trial court's granting of summary judgment for State Farm. State Farm knew or should have known that Mrs. Quinley was qualified to return to work as a secretary, October 10, 1994 as per Dr. Ray's certificate. As in Perez vs. Philadelphia Housing Authority (D.C. Eastern Pennsylvania 12-7-87) 1 AD Cases 1170, the employer knew or should have known that the receptionist/clerk who suffered a back injury consisting of severe lumbar sacral sacroiliac sprain was "otherwise qualified" to return to work part time so long as she could receive accommodations which would not have been expensive or impractical. In this case, certainly the accommodation Mrs. Quinley was asking was to work as she had worked for seven years as a secretary and not be required to bend, lift or stoop which request was neither expensive or impractical.

Factual issues exist in this case as to the motivations of State Farm and the ability of Mrs. Quinley to return to work with reasonable accommodations and the effort of State Farm to

accommodate Mrs. Quinley, if any. Those same factual issues in Stradley vs. LaFourche Communications, Inc. (D.C. Eastern Louisiana 11-14-94) 3 A.D Case 1507 negated summary judgment where there was a question as to whether the employee who had been diagnosed as unable to return to work was capable of performing essential job functions and regular attendance with accommodation of transfer from a supervisory position to a less stressful position of cable installer.

Again, here Mrs. Quinley had performed her job as secretary not requiring bending, lifting and stooping and had been laterally transferred to a position requiring that and was simply asking to return to a position not requiring bending, lifting and stooping which she had performed in the past and could perform in the future and which would not have been burdensome to State Farm.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION AFFIRMING THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT GIVEN THE PRESUMPTIONS THAT APPLY ON MOTION FOR SUMMARY JUDGMENT PRESENTS A DIRECT CONFLICT WITH THE PROVISIONS OF 42 U.S.C. § 1210 ET SEQ.

A. The Petitioner having presented evidence or ability to

hold down a position with the Respondent, State Farm Insurance Corporation, notwithstanding having a long established disability with reasonable accommodations had those accommodations removed by being required to shift to a position involving lifting, bending or stooping which the Petitioner could not perform which conduct on behalf of the Respondent, State Farm Insurance Corporation, evidenced a failure to reasonably accommodate the Petitioner all in violation of the requirements of Title I of the Americans with Disabilities Act of 1990.

The argument presented in support of Reasons for Granting the Writ I are adopted and incorporated herein specifically by reference in support of Reasons for Granting the Writ IIA.

B. The Respondent's Motion for Summary Judgment raised in and of itself material issues of fact as to the Petitioner's disability as the Petitioner being a qualified individual requiring accommodation due to physical limitations all of which, given the presumptions that apply on Motion for Summary Judgment in favor of the non-movant, the Petitioner, and specifically the provisions of Title I of the Americans with Disabilities Act of 1990 required a factual development denied by the granting of the Motion for Summary Judgment on behalf of the Respondent, State Farm Insurance Company.

The argument presented in support of Reasons for Granting the Writ I are adopted and incorporated herein specifically by reference in support of Reasons for Granting the Writ IIB.

III. THE COURT OF APPEALS IN UPHOLDING THE MOTION FOR SUMMARY OF THE RESPONDENT, STATE FARM INSURANCE COMPANY, AFFECTIVELY HELD THAT THE AMERICANS WITH DISABILITIES ACT OF 1990 DID NOT PROHIBIT THE REMOVAL OF REASONABLE ACCOMMODATION FOR A QUALIFIED EMPLOYEE ALL IN VIOLATION OF THE SPECIFIC PROVISIONS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990.

The argument presented in support of Reasons for Granting the Writ I are adopted and incorporated herein specifically by reference in support of Reasons for Granting the Writ III.

CONCLUSION

Title I of the A.D.A. requires employers to refrain from discriminating against qualified individuals with disabilities who with or without reasonable accommodations could perform the essential functions of their job, 42 U.S.C. 12112(a). Under the A.D.A. the Petitioner qualifies as a person having a physical impairment including a psychological order or condition as on numerous documented occasions she required surgery affecting her musculoskeletal system (29 C.F.R. 1630.2(h)(1); 42 U.S.C. 12102(2))

Limitations on substantial major life activities of Mrs. Quinley namely her ability to lift, stoop and bend clearly fall,

according to EEOC guidelines. 29 C.F.R. 1630.2(I), within the definition of "major life activities".

In regard to Mrs. Quinley's work, she was a person who was substantially limited a she was restricted in her ability to perform a class of jobs or broad range of jobs involving bending, lifting and stooping given her disability. (29 C.F.R. 1630.2(j)(3)(I))

The Respondent was familiar with Mrs. Quinley's restrictions on her ability to bend, lift and stoop although s he could perform her duties as a C3 Secretary not having to bend, lift or stoop. According to EEOC guidelines and regulations. (29 C.F.R. 1630.2(j)(Appendix) Even though Mrs. Quinley was not completely unable to work, she qualified as having a condition that would significantly restrict her ability to perform a range of work involving bending, lifting or stooping. Mrs. Quinley was in a position and had performed that job for in excess of nine years not requiring bending, lifting and stooping and notwithstanding notice to the Respondent of her musculoskeletal problems and her surgeries related thereto and her inability to bend, lift and stoop, she was transferred to a position requiring bending, lifting and stooping so that rather than accommodating Mrs.

Quinley's disability, additional impediments were placed in front of her resulting in not being able to perform that job ultimately resulting in her separation from State Farm Insurance.

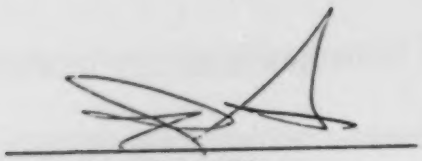
Mrs. Quinley to qualify for A.D.A. protection must have a record of having had a "substantially limiting" impairment and evidence of same could include medical records which in this case State Farm clearly had. (29 C.F.R. 1630.2(k)(Appendix) Mrs. Quinley was a qualified individual with a history of a disability who had performed her job as a secretary for nine years not requiring bending, lifting or stooping therefore was performing the essential functions of her job (42 U.S.C. § 12111(8); 29 C.F.R. 1630.2(m)(Appendix); 29 C.F.R. 1630.2(n)(2))

It is respectfully submitted that if, in fact, Title I of the Americans with Disabilities Act of 1990 is to be applied evenhandedly so as to prohibit the failure to accommodate a person with disabilities it must be also applied evenly to Mrs. Quinley prohibiting the placing of impediments before Mrs. Quinley when in fact she had performed her job as a secretary not requiring lifting, bending and stooping for some seven years. Put another way, if Title

I of the Americans with Disabilities Act of 1990 requires affirmative accommodations be given to someone with a documented disability certainly that act must be taken to prohibit the placing of impediments and/or the removal of accommodations so as to put a person with disabilities in the position of not being able to perform a job otherwise performable with reasonable accommodations. (29 C.F.R. 1630.2(o)(1).

If, in fact, Title I of the Americans with Disabilities Act of 1990 requiring reasonable accommodations for disabled employees is to be applied so as to prohibit the failure to make reasonable accommodations for disabled employees it must be applied in this case to Mrs. Quinley as Mrs. Quinley, even through disabled and restricted as to bending, lifting or stooping could perform and had performed satisfactorily her position as a secretary for some seven years and affectively was forced out of her job by being shifted from that position to a position in which she could not perform given her disability.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.



IRVING SILVER

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6798
Non-Argument Calendar

D.C. Docket No. 95-0271-RV-C

Regenia F. Quinley,
Plaintiff-Appellee,

v.

STATE FARM INSURANCE CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(April 22, 1997)

Before HATCHETT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

AFFIRMED. See 11th Circuit Rule 36-1.

"Costs taxed against plaintiff-appellant."

Entered: April 22, 1997
For the Court: Miguel J. Cortez,
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 95-0271-RV-C

REGENIA F. QUINLEY,

Plaintiff,

v.

STATE FARM INSURANCE CORP.,

Defendant.

ORDER

In this case, plaintiff Regenia F. Quinley charges that defendant State Farm Insurance Corporation ("State Farm") discriminated against her in violation of the Americans with Disabilities Act ("ADA"), 42 U>S.C. § 12101, et seq. The matter is presently before the Court on State Farm's motion for summary judgment and supporting brief (tabs

12 & 13). Ms. Quinley has filed a response in opposition to defendant's motion. See tabs 24, 25 & 26. State Farm has filed a reply (tab 27) along with a "motion to strike the affidavit of plaintiff Regenia Quinley" (tab 28).

This case is also before the Court on State Farm's "motion for continuance of pretrial conference" (tab 29). Ms. Quinley filed a response (tab 30) in opposition to this motion. Subsequently, however, Ms. Quinley withdrew her objection and consented to the continuance. See tab 31. The Court will address these motions in logical order.

I. Background

State Farm's claims office in Mobile, Alabama, hired Ms. Quinley as a claims secretary in 1985. She remained in that position until June 1993, when she was assigned to a job as a mail and file clerk. In late July 1994, Ms. Quinley began a continuous medical leave of absence for a sleep disorder. She asked to return to work on October 10, 19943, but State Farm delayed her return until it obtained an independent "fitness for duty"evaluation to determine her ability to perform her job duties. Ms. Quinley returned to work on January 16,

1995 but was terminated approximately three weeks later on February 6, 1995.

During the time she was employed by State Farm, Ms. Quinley experienced a wide variety of physical and psychological problems. The most significant of these was pain stemming from a back injury sustained in a September 1986 automobile accident, and aggravated in two subsequent car accidents in August 1992 and September 1993. In addition to the back injury, Ms. Quinley suffered a broken hand, migraine headaches, periodic chest congestion and bronchitis, "pathological grief reaction," depression, multiple syncopal episodes, diarrhea, abdominal cramps, sinusitis, high blood pressure, and a host of other ailments.

Ms. Quinley's medical and psychological problems caused her to be absent from work frequently. In 1990, these problems caused her to miss all or part of 34 work days; in 1991, all or part of 27 work days; and in 1992, all or part of 60 work days. In 1993, Ms. Quinley was absent all or part of 40 work days before her third automobile accident occurred in September 1993.

On July 25, 1994, she began a 2 1/2 month medical leave because of a sleep disorder. While on medical leave, Ms. Quinley feel off a swing at home and fractured her foot, requiring an extension of her leave. Between her third car accident in September 1993 and when she first sought to return to work from medical leave on October 10, 1994, Ms. Quinley missed all or part of 177 work days.

On October 14, 1994, Ms. Quinley filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting the following:

> I. I was hired by (State Farm) in November 1985. I have been denied reasonable accommodations and on October 10, 1994 was denied the opportunity to return to work following a medical leave of absence.
>
> II. No reasons have been offered for these actions.
>
> III. I believe I have been discriminated against because of my disability, in violation of the Americans with Disabilities Act, in that I was treated in this manner.

On February 7, 1995, the EEOC issued Ms Quinley a "notice of right to sue." On April 3, 1995, she commenced the instant action.

II. DISCUSSION

A. Jurisdiction

The Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343. Venue is appropriate in this judicial district pursuant to 28 U>S.C. § 1391(b).

B. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c);see Rice v. Branigar Org., Inc., 922 F.2d 788, 790 (11th Cir. 1991). The clear language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The party moving for summary judgment

bears the initial burden to show the district court, by reference

to materials on file, that there are no genuine issues of material that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); see mercantile Bank & Trust Co. v. Fidelity & Deposit Co., 750 F.2d 838 (11th Cir. 1985). The mere existence of a scintilla of evidence in support of the non-movant's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). At all times, however, the Court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all reasonable doubts in her favor. Addickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Barnes v. Southwest Forest Indus., 814 F.2d 607, 609 (11th Cir. 1987).

C.Conclusions of Law

1. Scope of ADA claim

The ADA is a federal statue that prohibits employment discrimination against disabled individuals. Title I of the ADA, under

which Ms. Quinley's claims fall, incorporates by reference the enforcement mechanisms provided for in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. See 42 U.S.C. § 12117(a). A claimant who wishes to bring a Title VII action in federal Court must first file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). Title VII further provides that "a civil action may be brought against the respondent named in the charge...by the person claiming to be aggrieved" within ninety days of receipt of a "right-to-sue" letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1).

Although the timeliness of filing an EEOC charge is in the nature of a statue of limitations, see Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982), the act of filing is a jurisdictional prerequisite to the commencement of a Title VII, or ADA, suit in federal court, see Thomas v. Kroger Co., 24 F.3d 147, 15k0 (11th Cir. 1994). Thus, unless a plaintiff has filed a charge with the EEOC and received a right to sue letter, the district court lacks subject matter jurisdiction to hear

that plaintiff's ADA claim. See Stewart v. County of Brown, _F.3d_, No. 95-2776, 1996 WL 313212 (7th Cir. June 12, 1996); McSherry v. Trans World Airlines, Inc., 81 F.3d 739 (8th Cir. 1996); Redlich v. Albany Law School of Union University, No. 94-CV-1021, 1995 WL 581244, at *2 (N.D.NY. Oct. 3, 1995).

Here, State Farm accurately notes that although Ms. Quinley has received a right to sue letter, the precise claims of disability discrimination covered by the letter or by the complaint are unclear. Consequently, State Farm articulates what it perceives are all the claims Ms. Quinley could possibly be intending to assert here. These are: (1) a claim that her reassignment from claims secretary to mail and file clerk in June 1993 was discriminatory because while she could perform the duties of the former position, her back condition prevented her from performing certain duties of the latter; (2) a claim that State Farm discriminated against her by delaying her return to work after her 1994 medical leave of absence; and (3) a claim that her termination on February 6, 1995 was discriminatory.

Having thus stated Ms. Quinley's potential claims, State Farm

contends that only the second is properly before the Court. Specifically, State Farm argues that the first potential claim is time barred because Ms. Quinley filed her only EEOC charge on October 14, 1994, well over 180 days after her June 1993 reassignment and that the third potential claim is barred because Quinley never filed an EEOC charge related to her discharge.

The Court finds State Farm's articulation of the possible claims here helpful, but disagrees with defendant regarding the viability of the first potential claim stated. It is inferable from Ms. Quinley's EEOC charge, and clear from her complaint, that she is asserting that State Farm denied her a reasonable accommodation for her alleged disability by its ongoing failure or refusal to reassign her to her old secretarial position. The first potential claim set forth above is merely a statement that her removal from that position in the first place was discriminatory. As such it states a claim of alleged discrimination that was ongoing at the time Ms. Quinley filed her EEOC charge and, thus, it is time barred. See Stewart, 1996 WL at *3 ("In order to benefit from the "continuing discrimination: theory, (a plaintiff) must show that the alleged untimely

act (the transfer) the timely act (the failure to accommodate his physical disability) are related enough to constitute a continuing violation.") (quoting Selan v. Kiley, 969 F.2d 560, 564-65 (7th Cir. 1992).

The Court concurs with State Farm regarding the third potential claim, however. Ms. Quinley was fired on February 6, 1995, which was not only several months after she filed her EEOC charge, but also only one day before the EEOC issued her a notice of right to sue. Obviously, that right to sue letter could not cover a claim for her discharge.

Thus, the Court finds that it has two ADA claims before it. First, that State Farm discriminated against Ms. Quinley by removing her from her secretarial position and failing to accommodate her alleged disability by reassigning her to that position. Second, that State Farm discriminated against Ms. Quinley by delaying her return to work following her 1994 medical leave of absence.

2. **Prima facie case under the ADA**

The ADA provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual (in any of the) terms, conditions (or) privileges of

employment." 42 U.S.C. § 12112(a). Indeed, the ADA requires such employers to provide reasonable accommodations for known disabilities unless doing so would result in an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A). "In order to establish a prima facia case of discrimination in violation of the ADA, a plaintiff must prove that (1) she has a disability; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability." Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996).

A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. § 12111(8). A "disability" is "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The ADA does not define such terms as "physical or mental impairment," "major life activity," or "substantially limits." Instead, these definitions are found in the regulations Congress directed the

EEOC to issue to implement the statue. See 42 U.S.C. § 12116 (providing EEOC with authority to issue implementing regulations); 29 C.F.R. Pt. 1630, Appendix to Part 1630--Interpretive Guidance to Title I of the ADA.

Under the EEOC regulations, "physical impairment" is defined as "(a)ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h)(1). "Mental impairment" means "a)ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i).

"If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life

activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." 29 C.F.R. § 1630, App., § 1630.2(j) (explanatory footnote added). "To determine whether a person is substantially limited in a major life activity other than working, we look to whether that person can perform the normal activities of daily living." Ray v. Glidden, No. 95-11162, 1996 WL 284978 (5th Cir. June 14, 1996); see Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 & n.11 (5th Cir. 1995) (plaintiff who sustained serious injury arm in gun accident not disabled under ADA where she could "feed herself, drive a car, attend her grooming, carry groceries, wash dishes, vacuum, and pick up trash" and attend to "all of the basic things" but where she was restricted from heavy lifting and repetitive rotational movements, and could not "pick up little things from the floor,...ha(d) trouble holding things up high or real tight for long period of time, and...sometimes ha(d) problems turning the car's ignition"). With respect to the major life activity of working.

(t)he term substantially limits means significantly restricted in the

ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3).

The primary ground on which State Farm seeks summary judgment here is its assertion that Ms. Quinley is not disabled for purposes of the ADA. Although Ms. Quinley suffered a multitude of illnesses and injuries during the time she worked for State Farm, her ADA claims are founded on her back problem. State Farm concedes that Ms. Quinley's bulging discs constitute a physical impairment, but contends that she cannot produce evidence that her impairment "substantially limits" any major life activity, including her ability to work.

In support of this contention, State Farm points out that (1) Quinley's doctors never imposed any permanent restrictions on her ability to perform any major life activity or any job task and (2) an independent "fitness for duty" examination and work capacity evaluation conducted before Quinley returned to work in January, 1995, an

examination and evaluation recommended by her own doctor, concluded with a finding that she could perform all her job duties as a mail and file clerk with no restrictions. See Abroms Exhs. 22, 23A, 23B, & 24. In response, Ms. Quinley argues that her bulging discs prevent her from "bending, lifting or stooping," thus rendering her disabled.

In considering whether Ms. Quinley's disc impairment constituted a disability at the times relevant to her complaint, the Court must first examine whether the impairment substantially limited a major life activity other than working. In this connection, the Court notes, that Ms. Quinley's response to State Farm's summary judgment motion contains no assertion that she cannot "perform the normal activities of daily living." Furthermore, in her August 9, 1995 deposition, she stated that her daily activities include "cleaning house," preparing meals, visiting friends and caring for three young dogs. She also stated that she rides a bicycle and that, subsequent to her discharge from State Farm, she had been walking up to three miles a day until she developed phlebitis in her feet.

As against this, is Ms. Quinley's assertion that she cannot bend, lift or stoop. In support of this assertion, Quinley provides some medical records and several letters written by her orthopedist, Dr. Joe B. Ray. Ms. Quinley's medical records confirm that she has mild bulging in her lumber vertebrae. Furthermore, Dr. Ray's letters evidence certain restrictions on Ms. Quinley's activities. Pertinent portions of those letters follow:

> Regenia Quinley has been under my care following a motor vehicle accident and was not able to work from 9/13/93 to 98/17/93.
> Dr. Ray Letter, Sept. 20, 1993.

> Regenia Quinley has been under my care for strain of her back following a motor vehicle accident on 8/20/93. She has not been able to work since 9/29/93. She can return to work on 11/22/93.
>
> Dr. Ray Letter, Nov. 22, 1993.

> I feel that although Ms. Quinley is largely improved from the aggravating factors of the accident of August 1993... She certainly has a tendency toward easy aggravation, easier aggravation than before. She does have at least three bulging lumbar disc (sic) which may eventually require additional investigation and treatment. I recommend that she not be expected to do any heavy lifting. She will have to be extremely careful about excessive bending and positioning. She needs to get up and move around fairly frequently in order to avoid stiffness and strain in the lower back.
>
> Dr. Ray Letter, Jan. 26, 1994.

Regenia Quinley has minimal bulging disc (sic)... There was no evidence of a disc herniation. All o this has been aggravated by a motor vehicle accident that she was involved in. She is doing much better but still has episodes of distress from the waist up, and this is aggravated by bending and lifting. She does okay with sitting because she gets up and down frequently, but lifting really throws her into a spasm.

> I feel that she is largely improved from the aggravating factors of the accident of August 1993 but she does have a tendency toward easy aggravation. She does have at least three bulging lumbar disc which may eventually require additional investigation and treatment. I recommend that she not be expected to do any excessive bending and positioning. She needs to get up and move about fairly frequently to avoid stiffness and strain in the low back.
>
> If there is any further question about her condition I would recommend that she have a functional capacities evaluation.

Dr. Ray Letter, Feb. 25, 1994.

> Regenia Quinley was seen and examined by me. She should continue to have the restriction on her work keeping her from doing excessive bending and heavy lifting.

Dr. Ray Letter, May 19, 1994.

> Regenia Quinley is under my care for her fractured foot. She will need to stay off work until I see her back on 10/6/94. A return to work date will be determined at that time.

Dr. Ray Letter, Sept. 29, 1994.

> Regenia Quinley may return to light duty work on 10/10/94. She should not be expected to do prolonged walking or constant

standing, squatting, climbing stairs, ladders. She needs to wear this comfort cast.

Dr. Ray Letter, Oct. 6, 1994.

Regenia Quinley was seen and examined by me on September 15, 1994 for navicular fracture of her left foot sustained on September 13, 1994 when a swing fell on her. She was put on crutches, placed in a cast walker boot, and given Cataflam 50mg to take tid. Ms. Quinley stated that she was already of work for a sleep disorder.

Ms. Quinley was last seen by me on October 6, 1994. She was still having a good bit of swelling, discomfort, and pain, but was tolerating her Comfort cast well. X-rays showed incomplete healing of the avulsion fractures. She was given a note to return to light duty work on October 10, 1994. She should not be expected to do prolonged walking, constant standing, any squatting, climbing stairs or ladders. She would need to continue to wear the Comfort cast. I will be seeing her back in three weeks for reevaluation.

Dr. Ray Letter, Oct. 12, 1994.

The Court is not impressed with Ms. Quinley's evidence. Initially, the Court notes that all of her supporting letters are dated subsequent to her June 1993 reassignment from secretary to mail and file clerk and to her third motor vehicle accident. Thus, Ms quinley has produced no evidence that she was subject to physical restrictions at the time of her job reassignment.

Second, the restrictions in Dr. Ray's October 6th and 12th, 1994 letters relate not to Ms. Quinley's back but to her fractured foot, a temporary injury which is not, and cannot be, the basis of her ADA claims. See Vande Zande v. Wisconsin Dep't of Admin, 44 F.3d 538, 544 (7th Cir. 1995) ("Intermittent, episodic impairments are not disabilities, the standard example being a broken leg."). Finally, all the letters submitted by Ms. quinley are dated earlier than the independent "fitness for duty" examination and work capacity evaluation that were conducted before she returned to work in January 1995 and which concluded with the finding that she could perform all the duties of a mail and file clerk without restrictions.

In view of the above, the Court finds that Ms. quinley's back condition does not substantially limit a major life activity other than working. Accordingly, the next inquiry is into whether her condition substantially limits the major life activity of working. In this regard, Ms. Quinley contends that she could perform all her duties as a mail and file clerk without difficulty except for putting away heavy supplies and

shifting files. This assertion is unavailing, however, because the inability to perform some aspects of a job while retaining the ability to perform the work in general does not amount to a substantial limitation on the activity of working. See Dutcher, 53 F.3d at 727. Also, Ms. Quinley has produced no evidence that she is "restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes" as is required to show a substantial limitation on work activity. See 29 C.F.R. § 1630.2(j)(2)(i).

In sum, while Quinley "may consider (herself) disabled, as that term is frequently used (.) Congress offered narrower relief to a more seriously deprived class of persons, when enacting the ADA." O'Dell v. Altec Industries, Inc., No. 94-6180-CV-SJ-6, 1995 WL 611341, *4 (W.D.Mo. Octo 16, 1995)(plaintiff not disabled under ADA although he was restricted to lifting no more than thirty-five pounds frequently and no more than fifty pounds occasionally because of back injury; court granted summary judgment for defendant employer); see Ray v. Glidden, _F.3d _, 1996 WL 284978, (5th Cir. June 14, 1996) (plaintiff's inability to perform continuous, heavy lifting did not render him disabled

under the ADA); Wernick v. Federal Reserve Bank of New York, No. 93 Civ. 2606, 1995 WL 598973 (S.D.N.Y. Oct. 10, 1995) (employee with bursitis and cervical and lumber spasms with restriction of "no prolonged sitting" is not disabled under the ADA; "an impairment does not substantially limit a person's ability to work if it disqualifies her from only a narrow range of jobs;" summary judgment granted); Lowe v. Angelo's Italian Foods, Inc., No. 93-1233, 1994 WL 675027 (. Kan. Nov. 18, 1994) (as a matter of law, lifting restriction of no greater than fifteen pounds and then only on occasional basis, restriction on climbing stairs, and need to sit occasionally did not substantially limit any of plaintiff employee's major life activities); Otis v. Canadian Valley-Reeves Meat Co., 884 F. Supp. 446 (W.D. Okal 1994), aff'd, 52 F.3d 338 (10th Cir 1995)(seventy pound lifting restriction not restriction of any major life activity, including work, thus plaintiff not disabled within meaning of ADA; summary judgment granted for defendant).

III. CONCLUSION

In light of the foregoing, the Court concludes that Ms. Quinley's back condition does not constitute a disability for purposes of the ADA.

Thus, she cannot make out a prima facie case of disability discrimination under the Act. Therefore, State Farm's motion for summary judgment (tab 12) is due to be and hereby is, **GRANTED**. Accordingly, **FINAL JUDGMENT** is hereby **ENTERED** in favor of defendant State Farm and against plaintiff Regenia Quinley on her ADA claims. Ms. Quinley shall have and recover **NOTHING** from State Farm on these claims, and the claims are hereby **DISMISSED with prejudice**. Each party will bear its own costs.

DONE this the 26 day of June, 1996.